IN THE MATTER OF THE ARBITRATION

-BETWEEN-

WILLIAMSPORT AREA EDUCATION SUPPORT PROFESSIONALS ASSOCIATION, PSEA/NEA

-AND-

WILLIAMSPORT AREA SCHOOL DISTRICT

GRIEVANCE NO. 11-18
DISCHARGE OF JAMES MEEK

OPINION
AND
AWARD

PRELIMINARY STATEMENT

The **UNDERSIGNED ARBITRATOR**, appointed by the parties, pursuant to the arbitration provision in the Collective Bargaining Agreement ("Agreement") for the term from July 1, 2013 through June 30, 2017, conducted a hearing on April 4, 2016, in the District's Board Room, Williamsport, Pennsylvania from 9:00 a.m. to 11:30 a.m. The Williamsport Area Education Support Professionals Association ("Association") was represented by William A. Hebe, Esq., Spencer, Gleason, Hebe & Rague, P.C.; Williamsport Area School District ("District") was represented by Jeffrey A. Rowe, Esq., Murphy, Butterfield & Holland, P.C. The hearing was declared closed after the parties submitted written briefs on May 4, 2016. The Award is due on or before June 4, 2016

ISSUES IN DISPUTE

Following are the issues in dispute agreed by the parties.

Does the Employer have just cause to discharge Mr. Meek from his employment?

If not, what shall be the remedy?

BACKGROUND

The employment relationship between the parties is governed by the Agreement for the period from July 1, 2013 through June 30, 2017. (Joint exhibit 1) Effective November 16, 2015, James Meek was suspended without pay pending action by the School Board ("Board") to terminate his employment. By letter dated November 19, 2015, from Anne Logue, Director of

Human Resources, formal charges were filed against him, but no meeting with the Board was scheduled to contest the charges because he chose to appeal through the grievance procedure.

The dismissal action was prompted by a complaint made by a teacher whose classroom is cleaned and maintained by Meek. On October 15, 2015, the teacher complained to Scott Ferguson, Custodial Supervisor, that her personal cell phone, which she had left behind on her desk, had been tampered with sometime after she left the building on Tuesday October 13, 2015 and her return at the beginning of her work day on October 14, 2015. Video footage of the hallway outside her classroom door indicated that no one except Meek had entered the room during the interim.[1] It was assumed by her and Ferguson that no one except Meek had attempted to access her phone's memory which caused it to shut down, a built-in feature. She said that she spent more than four hours with the service provider to unlock the phone.

As a result of her complaint, Ferguson installed a motion activated camera in the room to capture any activity. However, for reasons unexplained and not in the record, he did not place a decoy phone on the desk to bait Meek or the perpetrator into tampering with the phone. The camera captured Meek routing through the refrigerator, eating candy that was on the desk, reading a newspaper and other activities not related to his job on three separate occasions: October 15, for approximately five minutes; October 19, approximately seven minutes; and, October 20, for approximately six minutes**.** Furguson also checked the room and another classroom, bathroom and locker areas to determine whether they were cleaned appropriately during each of those shifts, which he concluded they were not.

On October 28, 2015, Meek was called to a meeting with Logue. Although he did not know the reasons for the meeting, he had representation from the Association after being informed that he had a right to representation. After viewing the video and admitting that he was not "fully engaged" in his work responsibilities at the time, he was suspended without pay on November 16, 2015, and informed by letter dated November 19, 2015, that the District will be seeking his dismissal.

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[1] Permanent surveillance cameras have been installed to monitor the hallways outside classrooms. There was not a permanent camera within this teacher's classroom.

> The administration is seeking your dismissal in accordance with §514 of the School Code, as a result of incompetence and neglect of duty. The administration alleges that you continue to fail to complete your assigned work duties, after five (5) separate occasions of disciplinary action imposed, ranging from verbal warning, written warnings and suspension. Additionally you were afforded the opportunity to be re-trained on your work duties via one (1) week of job shadowing and four (4) weeks of a focus assistance plan.
>
> (Exhibit M)

Action before the Board was suspended because Meek chose to appeal through the grievance procedure. The President of the Association, Rob Emerick, submitted a grievance on Meek's behalf dated November 18, 2015, seeking he be "immediately reinstated to his position and made whole." (Joint exhibit 2) Logue responded by email dated December 14, 2015 denying the grievance:

> As outlined in my letter dated November 19, 2015 sent to Mr. Meek in care of Mr. Kurtz, Williamsport Area School District Administration is seeking Mr. Meek's dismissal for failure to complete assigned work duties. As stated in the letter, Mr. Meek was disciplined on five (5) separate occasions for similar conduct, as well as provided the opportunity to be re-trained on his work duties via one (1) week of job shadowing and four (4) weeks of a focus assistance plan. In addition, video footage and photos from October of this year of Mr. Meek and his assigned work area, suggest he continues to fail to perform his work duties. As outlined in the Williamsport Area Education Support Professionals Progressive Discipline Guidelines, a fifth occurrence and beyond for this offense justified termination.
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> (Id.)

By email dated December 16, 2015, Cary Kurtz, Uniserv Representative, rejected Logue's decision and opted to pursue the matter through the grievance and arbitration provisions of the Agreement. By letter dated February 23, 2016, the grievance was submitted to arbitration and this Arbitrator was selected.

RELEVANT CONTRACT PROVISIONS

EXHIBIT NO. 1 [in relevant part]

AGREEMENT BY AND BETWEEN THE BOARD OF SCHOOL DIRECTORS OF THE WILLIAMSPORT AREA SCHOOL DISTRICT

ARTICLE 3
GRIEVANCE

Step 3 - APPEAL TO ARBITRATOR

(a) NOTICE OF APPEAL - In the even that the answer of the Director of Human Resources is unsatisfactory to the Association, the Association may within ten(10) work days after the receipt of the answer, refer the matter to arbitration, in writing, by delivery of the same to the Secretary of the Board.

(b) SECURING AN ARBITRATOR - ...A decision of the arbitrator shall be submitted in writing to the Board and the Association and shall be binding upon both parties and conclusive of the matter.

(c) POWERS/DUTIES OF ARBITRATOR - The arbitrator appointed as provided for this section shall have neither the jurisdiction nor the authority to add to, detract from or modify in any way, any provisions of this Agreement.

ARTICLE 4
EMPLOYEE RIGHTS

4-1: JUST CAUSE - No employees shall be suspended, disciplined or dismissed without just cause.

4-2: REQUIRED MEETINGS AND HEARINGS - Whenever any employee is required by the Board to appear before the Superintendent, Board, or any committee, or member thereof, concerning any matter which could adversely affect the continuation of that employee in his office, position, or employment, or salary, or any increments pertaining hereto, then he shall be given prior written notice of the reasons for such meeting or interview and shall be entitled to have a representative of the Association or legal counsel present to advice him and represent him during such meeting or interview. In the even that an employee is required, after reasonable notice to attend a meeting or an interview with any of his supervisors, and the purpose of such meeting is to discipline the employee, such employee may, at his election, have present with him a representative of the Association, if he so desires.

ARTICLE 6
MANAGEMENT RIGHTS

6-1: The parties agree that the Board retains the exclusive right to manage its business and direct its personnel, except insofar as the right to manage and direct is limited by the specific terms of this Agreement and the applicable laws of the Commonwealth of Pennsylvania.

6-2: The parties agree that Cafeteria Managers and Head Custodians are important to provide cost-effective quality services. Therefore, Cafeteria Managers and Head Custodians shall as a condition of employment be responsible for scheduling and

assignment of personnel and for the satisfactory completion of the duties scheduled and assigned. The responsibilities shall include ensuring the highest standards of safety and cleanliness, instructing personnel in the safe, proper and efficient use of equipment, assisting in the interview and selection process for new personnel and personnel assignments, assisting in the evaluation of personnel, and reporting, in writing, if requested, on any personnel problems which impede providing high quality cost-effective services. The District will not seek a unit clarification to exclude those employees from the unit without mutual consent.

ARTICLE 14
OTHER BENEFITS

14-5: MEET AND DISCUSS - A joint committee shall be formed consisting of two (2) representatives of the Association and two (2) representatives of the Employer, one (1) of which may be a member of the School Board. The committee shall meet at the request of the Employer or Association and discuss such items as are provided in Act 195 of 1970. The authority of the joint committee shall be to recommend to the School Board. Any decision or determination on matters so discussed shall remain with the School Board whose decision shall be final. Meetings shall be held at a mutually agreeable time and place, not during the school work day. The initiating party shall submit, in writing, the agenda specifying all of the items to be discussed at least five (5) days prior to the meeting.

ARTICLE 19
DURATION

19-1: Both parties to the Agreement agree that they have fully bargained with respect to all items which are negotiable between the parties, and both parties agree that during the term of this Agreement there shall be no further negotiations with respect to any subject or item, irrespective of whether or not the subject or item is contained in this Agreement. Nothing contained in this paragraph shall be construed in any way so as to prevent the negotiation of a successor contract. All the rights, privileges, and responsibilities of the Board may be fulfilled by it through its agents or employees. This section does not preclude items presented under the terms of Meet and Discuss noted in Article 14-5.

POSITION OF THE DISTRICT

The District terminated Meek's employment because the prior incidents and the current fifth incident clearly show that he was not performing his job satisfactorily. The preponderance of the evidence shows that the District had just cause to terminate Meek's employment in accordance with Article 4-1.

The District did everything within its power to ensure that Meek was aware of his job duties, including a list of daily tasks that was posted in his custodial closet. Among those tasks are cleaning the restroom and sinks, vacuuming under and around items in rooms and removing debris

from floors.

As a result of prior incidents where his work was unacceptable, Meek had undergone two attempts to retrain him since the spring of 2012. He engaged in job shadowing with another custodian in 2012 and completed a focused assistance plan in April 2014. Yet, despite these efforts, his work remained below expectations in several locations within his area of responsibility.

Pictures taken after his shift on October 16, 2015, show several examples of deficient performance, demonstrating his inability or unwillingness to successfully complete the assigned tasks. He missed pencil shavings, cobwebs, gum, gum wrappers, paperclips, pieces of paper, a bottle cap, cookie crumbs and a scissors. He didn't clean spots on the floor that were easily removed. Videos taken on three separate nights during his shift show he did little of what is expected and listed on the daily task list. Instead he is seen wandering aimlessly, raiding the refrigerator, helping himself to candy, and reading a newspaper. Very little actual cleaning is taking place. Each night the videos demonstrate that he engages in similar non productive activity.

This current incident is not the first time he has exhibited poor work habits. He has had at least four prior incidents when he had been disciplined, November 2011, verbal warning, November 2013, written warning, March 2014, written warning and a Focus Assistance Plan, December 2015, three day suspension. According to the District's Progressive Discipline Guidelines ("Guidelines"), a fifth incident of failing to complete assigned work duties justifies the current termination of his employment.

Even though the Association asserts that dismissal is not warranted because he has a positive performance evaluation in June 2015, his prior disciplinary history shows a pattern of discipline followed by improvement followed by poor performance. For example, after being disciplined in March 2012 and completing job-shadowing that spring, he was again disciplined for poor quality work in November 2013. After being disciplined in March 2014, he successfully completed a focused assistance plan in April 2014 only to be disciplined again for the same issue in December 2014. A positive evaluation was followed again by yet another instance of poor performance.

Although the Association argues that the Guidelines should not be considered because they were not bargained or agreed upon by the parties, the District is well within its discretion to

terminate Meek based on the sheer number of instances of poor job performance. Further, the District notes it consistently has consulted the Guidelines for the last two years and the Association has never filed a grievance about their use, only their application. Their application in this case, with these facts and the number of prior disciplinary actions, does not change the conclusion that dismissal was the appropriate remedy.

The Association contends that under Article 4-2, Meek was entitled to written notice of the reasons for the investigatory meeting. The Association's interpretation on 4-2 is in error, because 4-2 only requires prior written reasons for meetings that may occur with the Superintendent, Board, a committee of the Board or a member of the Board when such meeting may result in termination of employment. The October 28th meeting was with the Director of Human Resources and other members of the administration, which is governed by the following provision: "In the event that an employee is required, after reasonable notice, to attend a meeting or an interview with any of his supervisors, and the purpose of such meeting is to discipline the employee, such employee may, at his election, have present with him a representative of the Association, if he so desires." (Joint exhibit 1) Accordingly, Meek was afforded the proper notice for that meeting and advised that he could have an Association representative with him, which he did.

The Association is in error arguing that the District denied him due process by placing a video camera in the classroom without his knowledge and without out prior bargaining. Article 19 contains a waiver that asserts that the Agreement is the full and complete understanding between the parties, and that neither party may require negotiations during its term over any matter whether or not addressed in the Agreement. The Association had the chance to negotiate the District's use of cameras for employee discipline and failed to do so during bargaining for the current Agreement. According to Superintendent Dr. Donald Adams, stationary security cameras were first installed ten years ago, and non-permanent cameras were first used for employee discipline in 2009. The Association never disputed the use of the cameras for any purpose. The practice preceded the most recent round of contract negotiations which concluded in 2014. Although Meek had no written notice that video footage may be used when needed, he and the Association had actual knowledge of the existence on cameras. Finally, the Association's

complaint to the Pennsylvania Labor Relations Board ("PLRB") has been declined, because the use of cameras to observe employees at work has already been determined in favor of their use. According to case law, the installation of cameras in public work areas where there was no expectation of privacy did not create a bargaining obligation. A public employer has authority to observe work performance during work time as a matter of supervision and direction of personnel, whether the observation is done by supervisory personnel or video camera. In Meek's case, he had no reasonable expectation of privacy while he was working in the classroom or the halls. He had no reason to think that his presence in the classroom was private, and therefore entitled to legal protection.

Finally, Meek's claim that he performed his job as well as he could given the condition of his knees comes too late, because the District was not aware that he had any physically limiting conditions. Although Ferguson was aware that he limped, Meek didn't inform him of any physical impairments or express any concerns about his ability to physically perform the job. His claim that he reported this injury to his supervisors in 2012 is not credible. Although he stated that his problems were not work-related, he explained that his knees were injured from collapsing bleachers when he was assigned to the middle school and that he did not file a Worker's Compensation claim. At no point, including on three occasions after he says he had surgery in 2012, did he mention that knee pain or any other physical limitation was making it difficult for him to successfully perform his job.

In conclusion, the current incident is at least the fifth documented occasion where he was not performing his job satisfactorily. The District has done all that it should be required to help him improve his work product and reform his work ethic to meet District standards. At this point, the termination of his employment is the District's last and proper resort. Accordingly, the grievance should be denied and his dismissal upheld.

POSITION OF THE ASSOCIATION

The District did not have just cause to terminate Meek's employment because it is not supported by the preponderance of the evidence, the lack due process and the surreptitious use of the video camera to observe his work.

The Agreement requires due process whenever employees are summoned to meetings with supervisors if the reasons for the meeting could result in discipline up to and including discharge. According to Article 4-2, Meek should have been given prior written notice of the reasons for the October meeting that resulted in the termination of his employment. Instead, he appeared at the meeting only knowing that he could have representation, but not knowing what specific matters were to be discussed, which placed him at a disadvantage. Article 4-2, written specifically to eliminate that possibility, was violated by the District. Similar contract language was contained in the contract which was involved in an arbitration in another district where the Arbitrator found that the District's failure to comply with the procedural requirement was an important consideration in determining whether just cause existed for termination. In Meek's case, this violation by itself calls for his reinstatement.

His job performance in the past has resulted in warnings and discipline. Subsequent to those incidents, his job performance was rated as a satisfactory, including written evaluations which rate him as satisfactory and/or demonstrate that he meets the requirements of his job. Specifically, it is especially important to note the glowing nature of his evaluation for the 2014-2015 school year, where his supervisor noted that he met all requirements, was satisfactory with regard to the quality of the job which he did and that he was a valuable asset to the high school custodial staff. Afterward, he worked during the following summer and fall until late October without being informed that his work was anything other than satisfactory until this current incident.

The surreptitious placing of the surveillance camera in the classroom is disturbing. If other employees were observe in this manner, would they stop, sit down, take a break, look at a newspaper, scratch themselves, rest, take a piece of candy from an open candy dish on a teacher's desk or simply spend some time wandering around as depicted in the video? While working, one has some expectation that his or her activities will be private. In the instant case, it is odd that a camera would be placed in a room to capture someone who is suspected of "fiddling" with a teacher's cell phone and not place another cell phone there to see if the conduct was repeated. Clearly, Meek was a target with regard to the cell phone, yet the camera was simply placed to capture any and all activity except the suspect behavior in the room during his work shift.

Moreover, the District has not adopted any type of policy authorizing the surreptitious placement of video cameras in work spaces. Also the Agreement is silent with respect to the placing surveillance cameras in employees' work spaces. Apparently, since Meek is the only employee who has ever had a video camera placed in a classroom where he is working, the Distract acted in a manner completely at odds with the longstanding practice of no video cameras in classrooms. The placing of a video camera and then utilizing the results of such videotaping to discipline/dismiss an employee violates both the express and implied terms of the Agreement. The use of video camera is a mandatory subject of bargaining because it resulted in discipline and clearly impacts wages, hours and terms and conditions of employment. The Agreement therefore was violated by the surreptitious surveillance during Meek's work shift.

The employer was negligent in placing the video camera since it failed to capture the accurate time of Meek's activities. We do not know from whether the activities were occurring during the beginning, middle or end of his shift. Perhaps, by the time he was seen and videoed in suspect classroom, he had finished all of his other work and was simply concluding his shift. Ferguson's complaint seemed to be that Meek was wandering around, moving too slowly, reading a newspaper and taking candy from a candy dish on the teacher's desk. It certainly would have been helpful to know what time was involved in the videotaping.

The attempt to justify Meek's discharge by the application of the Guidelines is a violation of the Agreement. A former Human Resource Director developed them and failed to secure Association approval. The Association never signed off on or agreed to them, considering them to be a work in progress. Meek's dismissal cannot be justified on the basis of guidelines never agreed upon by the Association and not encompassed within the Agreement.

In conclusion, Meek's 10 years of job evaluations best describe the quality of his work. He has always been rated and evaluated as satisfactory and meeting the requirements of his job. During the 2014-2015 year, the quality of his work was found to be satisfactory and no complaints were lodged against him from the time of that evaluation until he was suspended. The District Agreement by not providing prior written notice of the reason or reasons for the October 28 meeting. The District surreptitiously placed a surveillance camera for the very first time in a classroom, capturing his activities at an unknown time during his shift, and it seems to

rely on some photographs taken of gum wrappers, pencil shavings and a black mark on a floor on two of the twenty-four or so or more rooms, bathrooms and hallways for which Mr. Meek has responsibilities. There is no just cause for dismissal, and it is respectfully submitted that there is no just cause for any discipline, especially in view of the employer's violation of the Agreement with regard to notice and its surreptitious placement of the surveillance camera.

DISCUSSION AND OPINION

The District had just cause to discipline Meek for loitering on the job. However, discharge is too severe considering, especially with the procedural errors that occurred.

1. Just Cause

There is not much to add other than the District had just cause to discipline Meek for loitering on the job and inattention to detail. During the three short periods captured by the camera placed in the classroom he was observed snooping, reading a newspaper and performing other functions that were not related to performing his required and assigned duties during a time he was not on either paid or unpaid breaks. Further, the still pictures taken by his supervisor demonstrate his lack of attention to detail and deficient work product in only four different areas of his cleaning responsibility, Mr. Buck's room, Ms. Tripoli's room, the lockers, and a bathroom. Missing are examples from other areas and classrooms to give a more complete picture of the quality of his work throughout his assigned responsibilities, which among other deficiencies argue for mitigating the discharge.

2. Physical Limitations

The Association is not persuasive arguing that his performance is hindered by physical problems and limitations. There is no record that he injured himself on the job or that he reported his physical problems seeking to obtain an accommodation. It is his responsibility and duty not the District's to report job related injuries and to seek a reasonable accommodation for physical problems that may interfere with his work performance. The District cannot be expected to know he has limitations and consider them when it is not aware of them. Surely he cannot raise them to claim the District did not have just cause for disciplining him or to mitigate any penalty that is

imposed at this late date, especially when his inattention to his work as seen on the video footage has nothing to do with any physical condition.

3. Due Process

The Association is not persuasive arguing that Article 4-2 requires prior written notice of the reasons for the meeting that occurred on October 28, 2015, with Logue given the construction of the provision.[2] According to Article 4-2, he was required to have been "given prior written notice of the reasons for such meeting or interview" when the meeting is "before the Superintendent, Board, or any committee, or member thereof." It's obvious that the meeting was not with the Superintendent or the Board, and not with a committee of the Board or Superintendent. A 'committee' is a group of people appointed generally *ad hoc* by a larger group or body, in this case by the Board or Superintendent, to deal with a specific on unexpected matter that may have arisen.

In Meek's case, the meeting was not a committee or member of the Board. The final the sentence of 4-2 distinguishes meetings with supervisors from meetings with the Superintendent and Board by requiring meetings with supervisors to have "reasonable notice to attend a meeting or an interview with any of his supervisors, and the purpose of such meeting is to discipline the employee, such employee may, at his election, have present with him a representative of the Association, if he so desires." (Supra) There is no requirement for reasons, written or otherwise, to be provided beforehand. This is not an 'ambush' as the Association argues, because Meek had options. He could have refrained from commenting until he had time to review the recordings privately with his representative or he could have remained silent. Whether the omission of reasons is a result of oversight or by design, Meek was not entitled to prior written reasons for the October 28, 2015 meeting.

4. Progressive Discipline Guidelines

The Guidelines do not supercede the Agreement nor control how just cause and any subsequent penalty under Article 4-1 should be determined. There has to be evidence that the

[2] In the arbitration between Montrose Education Association and Montrose School District cited by the Association, the language though similar requires written reasons for disciplinary meetings with the Superintendent or "his representative". There is no provision specific to such meetings with supervisors as contained in Agreement, Article 4-2.

parties specifically and definitively entered into the modification for the Agreement to be enhanced or superceded by any policy that is intended to modify the Agreement, especially with the incorporation of the zipper clause in Article 19, which the District argues defines the limits of the Agreement as to only those provisions contained therein.[3]

Further, Article 14-5 provides a formal vehicle for the parties to meet and discuss, by a "joint committee ... of two (2) representatives of the Association and two (2) representatives of the Employer ... such items as are provided in Act 195 of 1970. The authority of the joint committee shall be to recommend to the School Board. The recommendations of that committee "shall remain with the School Board whose decision shall be final." (Supra) With respect to the Guideline discussions between the parties, there is nothing in the record to indicate that those discussions were carried out under these provisions. According to Kurtz and Logue, the initial discussions occurred before Logue was hired approximately one year before Meek's discharge.

Kurtz:

> We never really reached an agreement where this document became part of the Collective Bargaining Agreement or was added as a supplement to the contact or any type of membrane of understanding of anything like that. The union never signed off on these as something that was not agreed upon policy... Yes, it was always a work in progress. In fact, for a number -- after Mr. Holloway who was president at that time was furloughed by the district and a new president took over Ms. Savage contacted me a number of times to say, hey, we still need to agree on these guidelines. We haven't done anything with them yet and I said, well, my people aren't real satisfied with them and, you know, we're still -- we're still working our response and then she left the district and we never really -- it came to fruition or even on the guidelines.
>
> (Transcript, p. 64)

Logue:

> They actually came about -- I started my position as the director of human resources in August of 2014 and Mr. Emerick who is the president of the union had -- had met with me and had referenced or mentioned that there were in the past progressive discipline guidelines. It appeared that they weren't being utilized in any way. It was a document that I think was just not necessarily formally

[3] The District cannot have it both ways; either the zipper clause limits the Agreement to the terms contained therein or it doesn't. However, the Arbitrator is not making any decision or interpretation as to the limits the Agreement's zipper clause places on the overall collective bargaining relationship between the parties and their duty to bargain under the Act.

> carried out and he had indicated that he thought it would be a good idea for us to revisit that document and perhaps reimplement or reinstate some sort of guidelines for progressive discipline so we worked together to finalize these guidelines.
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> (Transcript, p. 55)

It appears that formal discussions occurred during Savage's tenure although it is not clear under what authority, as meet and discuss under 14-5 or as reopened bargaining by mutual agreement. The discussions Logue had with Emerick don't appear to fit any model either. In both discussions, there should have been some formal documentation that the parties agreed to modify Article 4-1 to incorporate them in addition to the final statement contained in the Guidelines, "The Association's agreement to this protocol does not waive its right to challenge whether the District has just cause for imposing discipline at any level." (Exhibit N) This statement may not stand by itself as evidence that the Association agreed to and adopted the Guidelines. Rather, it is a statement incorporated to protect the employees' rights under Article 4-1 if and when the Guidelines become a modification or enhancement to the Agreement. The differing testimony given by Logue and Kurtz clearly demonstrate that the Guidelines were not accepted and adopted. The absence of formal documentation makes them management guidelines or reference that have no force and effect upon the determination of just cause and any discipline that may follow.[4]

5. Camera

The use of the cameras to observe Meek's work is not a violation of the Agreement. It is another means for supervisors to observe his work. The Association is not persuasive arguing that neither Meek nor the Association was notified that such footage could be used for evaluation and discipline. No notification is necessary since cameras are permanently located in other places outside the classrooms where employees and Meek may be observed performing their work. The Association had ample opportunity during the bargaining leading up to the current Agreement to negotiate over their use for evaluation and discipline.

The placement of the camera in the specific classroom was prompted by his allegedly tampering with a teacher's cell phone. Yet, the District did not put a phone in the room for the cameras to capture him tampering with it to confirm whether he was the guilty party. The absence

[4] The Arbitrator is not doubting Logue's credibility, honesty and integrity regarding her testimony as to the derivation, force and application of the Guidelines.

of that phone makes the motive for installing the camera questionable and a mitigating factor.

6. Discipline

Discharge is not appropriate because it was determined arbitrarily.

The District relied on the Guidelines to determine that discharge is the only non discretionary option, because Meek had four prior offenses. According to Logue:

> Q Now, I would note in looking at the document other boxes for prior offenses, the first through fourth offense seem to offer some discretion amongst the district or on behalf of the district; is that correct?
>
> Q Is there any discretion accorded for the fifth offense?
>
> A No, there's not.
>
> Q So termination is the only option --
>
> A That's correct.
>
> Q -- under the guidelines?
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> A Under the guidelines, yes.
>
> (Transcript, p. 57)

The strict adherence to the Guidelines which is meant to be a reference only clearly shows that there was little analysis and consideration given to any factors that may have mitigated against discharge for a lesser penalty. Just cause requires a broader consideration of the circumstances and other matters to determine if discipline is appropriate and the specific penalty that should be applied. Even with his record of discipline followed by improvement and failure should have been weighed with his performance evaluations to arrive at the appropriate discipline. The decision to discharge him was arbitrarily determined by applying 'a five strikes and out' policy, a procedure that is not considered under the just cause standard, which the Guidelines do not modify or supercede.[5]

Moreover, it is difficult to weigh his record of discipline for poor work against his

[5] Often contracts will list specific violations the parties consider to be just cause that require automatic penalties and discharge. This Agreement is not one of them.

performance evaluations that rate him 'satisfactory' in all categories consistently. Especially troubling is his evaluation for June 11, 2015, where is rated 'satisfactory' for performing essential job functions with an overall rating of 'meets requirements' and "has become a [sic] asset to the Williamsport High School custodial staff" only to be discharged a few months later. (Exhibit A-1 at 14) The same is true for June 2005, 2007, 2008, 2009 and 2010 where he received 'satisfactory' ratings for all areas including 'Quality of Work'. Each subsequent 'satisfactory' evaluation lessens the cumulative effect of each discipline, rendering them nearly useless to support the discharge.

Moreover, the majority of the discipline he received was the result of complaints from school staff, while his supervisors have been giving him good annual evaluations. Obviously absent are periodic evaluations or observations done randomly during the year between the annual evaluations, which would reinforce the District's claim that he only improves immediately after discipline and reverts to poor performance later. Stated bluntly, his disciplinary record directly contradicts his evaluation record making both ineffective, a contradiction that must be resolved.

Finally, the original reason for using the cameras to observe his work was his being suspected of tampering with the teacher's cell phone. The lack of a decoy phone to bait him is troubling and raises questions about the District's motivation.

In summary, given the totality of the circumstances leading up to the current incident, discharge is not appropriate. After considering his performance evaluations, disciplinary record and behavior captured on the video footage, in addition to the procedural errors, the discharge is reduced to a five day suspension without pay. Another Focus Assistance Plan is not necessary, because Meek knows what is expected of him and how he can meet those standards. Instead, he should re-evaluate and change his work ethic and performance so that the District consistently is receiving full value for the pay he receives; his supervisors should perform periodic and random evaluations of his work throughout the year rather than reacting to complaints followed by discipline, a proven ineffective means to manage and motivate employees to improve outcomes.

For the reasons state above, the Arbitrator makes the following Award.

AWARD

The Grievance is **DENIED** in part and **UPHELD** in part. The District had just cause to discipline Meek for loitering on the job and poor work performance on October 15, 19 and 20, 2015. He shall be reinstated retroactive to the date he was taken off the payroll. Within 30 days from the date of this Award, the District is directed as follows:

1. Reinstate Meek retroactive to the date of his suspension and termination of employment and replace the termination with a suspension without pay for 40 hours for loitering on the job and poor work performance on October 15, 19 & 20, 2015;

2. Pay full back pay for the period of suspension without pay and for the time his employment was terminated up to the date he is returned to work and placed on the payroll. The back pay he receives shall be reduced by the 40 hours for the suspension, any income earned during the time, and any workers compensation he may have received. The District shall pay interest based on the Pennsylvania Post Judgement Interest Rate for back pay outstanding after 60 days from the date of this Award calculated retroactive to the date of this Award.

3. His record shall be modified to reflect the suspension for loitering on the job and poor work performance.

4. He shall otherwise be made whole.

The Arbitrator retains jurisdiction only to resolve any matter that may arise over the implementation of this Award.

May 23, 2016

John C. Alfano, Arbitrator
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Scranton, PA 18505
WILLIAMSPORTASDwilliamsareaespa2016